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In The

# Supreme Court of the United States

ROLAND ANTHONY EVANS,

*Petitioner,*

v.

GENE M. JOHNSON, in his official capacity as Director of the Virginia Department of Corrections,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

## BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI


ROBERT F. MCDONNELL
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
*Counsel of Record*
wthro@oag.state.va.us

STEPHEN R. MCCULLOUGH
Deputy State Solicitor General
smccullough@oag.state.va.us

OFFICE OF THE
ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219

Telephone: (804) 786-2436
Facsimile: (804) 786-1991

*Counsel for Respondent*


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COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTION PRESENTED

The respondent believes that the petition presents the following question:

Did the Fourth Circuit Court of Appeals err in denying habeas relief when a state court made a factual finding, after a hearing, that a statement by an outside party to a juror had no prejudicial effect on the jury?

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## BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Virginia Attorney General Robert F. McDonnell, on behalf of Gene M. Johnson, in his official capacity as Director of Virginia Department of Corrections, and pursuant to this Court's request of May 9, 2008, submits this Brief in Opposition.[1]

## INTRODUCTION

Although this matter involves a denial of a writ of habeas corpus, the petitioner frames the issue as if it were a direct appeal, subject to *de novo* review by this Court. Because the petitioner seeks review of a federal habeas corpus adjudication, the petitioner must show that the decision by the state court must be overturned under the highly deferential standard set forth in the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). He cannot do so. Initially, the state trial court stumbled when it failed to conduct an evidentiary hearing on the impact of an *ex parte* communication between a third party and a juror. The state intermediate appellate court reversed this decision and remanded the case to the state trial court for a proper hearing. The petitioner was then afforded a hearing, where the trial court heard testimony and assessed the credibility of the

[1] On May 20, 2008, this Court extended the time for such filing to and including June 30, 2008.

witnesses, and concluded that the statements by the third party to a single juror had no adverse effect on the jury verdict. This decision was in full accord with the procedures and standards set by this Court. There is simply nothing worthy of a writ of certiorari in the present petition.

## STATEMENT OF THE CASE

**1.** Roland Anthony Evans was charged with rape, forcible sodomy, abduction with intent to defile, and assault and battery. Pet. App. 50a. At his jury trial in the City of Alexandria, the jury heard two conflicting accounts. Evans developed a friendship with a woman named Williams. They had meals together, watched movies and television together, and smoked marijuana together. Pet. App. 49a. On three occasions, Evans spent the night on a couch in Williams' apartment. Williams denied ever engaging in consensual sexual relations with the petitioner, or using cocaine with him. Pet. App. 49a.

Williams testified that Evans arrived at her home unexpectedly after 10:00 p.m. on December 27, 2000. She eventually let him in. When he sat on the sofa, she noticed that he had been drinking. Williams asked him to leave, but he refused. He grabbed her by the throat, closed the door, and struck her. Pet. App. 49a. She screamed, hoping someone would come to her aid. Pet. App. 49a. The person who resided below Williams' apartment said she heard noises from

Williams' apartment between 11:00 p.m. and 3:00 a.m., which indicated a fight was going on. Pet. App. 49a.

Williams eventually begged Evans to stop the assault and told him "you can do anything you want to do to me, just don't hit me [any] more." He then raped her on the sofa and forced her into her bedroom where he raped her again and sodomized her. Evans stopped the rape when he became sick. Williams left her apartment wearing only a shirt and asked the attendant at her apartment complex to call the police. The police arrived at 4:30 a.m. They found Evans asleep on Williams' bed and arrested him. Pet. App. 50a.

**2.** Evans testified in his own defense. He said he had consensual sexual intercourse with Williams. In his account, fighting broke out when Williams refused to pay him for some cocaine he had procured for her. Evans said he became angry and threatened to take Williams' car. He claimed that a fight ensued over the car keys, during which Williams sustained injuries and several items were broken in the apartment. Pet. App. 50a.

The jury returned a verdict of guilty and recommended a sentence.[2] After the jury was discharged, but before sentencing, Evans' counsel asked for a bench conference regarding contact between a juror and an outside party. Pet. App. 50a. The court questioned the juror whether he had "overheard or discussed anything with anybody during the trial." The juror answered that he had "[n]ever discussed the case with anyone." The juror further recalled that a man said that he was there for the Evans trial. Upon hearing this, the juror walked away. Pet. App. 50a-51a.

Evans' counsel filed a motion for a new trial on the basis of juror misconduct. In support of the motion, counsel attached an affidavit from a juror, named Mose Haley, saying, among other things, that he had been approached on the second day of the trial by Gaster Hunter. Hunter told Haley that "[h]e hoped they gave his nephew forty years . . . that his nephew 'thinks he's slick' . . . that [h]is nephew is always in trouble and that his nephew had been in this kind of trouble before." Pet. App. 51a. The juror further stated that he ended the conversation as soon as he

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[2] Evans was sentenced to serve a total active sentence of twenty-seven years and six months, with an additional three years suspended—well below the possible statutory maximum. In Virginia practice, the jury recommends a sentence, which the court can, in its discretion, lower. *Virginia Code* § 19.2-295(B). The Court orders a presentence report providing the Court with additional details about a defendant and then, generally several months later, pronounces sentence. *See Virginia Code* § 19.2-299.

realized it was about the defendant, and that he did not realize initially that the stranger was speaking about the defendant. Pet. App. 52a. This affidavit was procured by an investigator from the Public Defender's Office named Clarence or "C.E." Nelson. Pet. App. 52a. In response, the prosecutor presented an affidavit from the same juror. In this second affidavit, Haley said that he had assumed that the investigator from the Public Defender's Office was actually with the prosecutor's office. Pet. App. 52a. The juror further averred that the defendant's uncle "did not say anything about the relative being in trouble before. He also did not say anything about him being in that kind of trouble before." Pet. App. 53a. With respect to the prior affidavit, the juror stated that "I did not notice those statements on the paper Clarence Nelson had, or I would not have signed it. I did not read this paper carefully. I did not tell him what to put in that paper, he had it written before he came to see me." Pet. App. 53a. Finally, the juror stated that he "did not receive any information that could have or that did affect my opinion about the case." Pet. App. 53a. In response to this affidavit, the investigator from the Public Defender's Office submitted an affidavit in which he explained how he obtained the statement from the juror.

The trial court declined to hold a hearing. Instead, the court ruled that the juror's first statements, in open court, as well as the statements in the second affidavit, were the correct ones. Pet. App. 53a. The trial court also concluded that even if

the statements in the juror's first affidavit were correct, the court would still find the allegations insufficient to order a new trial. Pet. App. 53a-54a. The court denied the motion for a new trial. Pet. App. 54a.

**3.** On appeal to the Court of Appeals of Virginia, the Court reversed. In a published opinion, *Evans v. Virginia*, 572 S.E.2d 481 (Va. Ct. App. 2002) (reproduced at Pet. App. 58a-60a), the Court held the trial court erred in concluding that the allegations in the first affidavit, if true, would not warrant a new trial. Pet. App. 58a-59a. Second, the Court concluded that the trial court had not adequately inquired into the facts. The Court remanded the case so the trial court could "conduct[] an adequate investigation upon evidence properly presented at a hearing." Pet. App. 60a.

**4.** On remand, the trial court conducted an evidentiary hearing. The juror, Mose Haley, testified that during a lunch recess, on the second day of Evans' trial, he was approached by a person later identified as Gaster Hunter. Haley said that Hunter told him that he was there to support Hunter's "sister or somebody." Haley recalled that Hunter said "he's slick, you should give him 40 years." When Haley asked what case Hunter was talking about, Hunter said "the Evans case." Upon hearing this, Haley walked away. Haley testified that Hunter's comment did not affect Haley's opinion of the defendant or Haley's decision as a juror. Pet. App. 45a. Indeed, he stated that he was "very sure" that Hunter's

comment did not affect his decision as a juror. Tr. 12/30/2002 at 11. Haley did not repeat Hunter's comment to any of the other jurors. Pet. App. 45a. Haley also testified that he did not tell the investigator from the Public Defender's Office several of the facts contained in the affidavit the investigator prepared for him to sign. Pet. App. 44a-45a. Haley specifically denied telling Nelson that Hunter told him his nephew was always in trouble, and that Hunter said his nephew had been in "this kind of trouble before." Pet. App. 45a.

Three other jurors corroborated Haley's account with respect to whether Haley relayed any communications to them. They testified that Haley did not repeat during their deliberations any comment that was made to him outside the courtroom. Pet. App. 45a. One juror, Ruth Kay, testified that she did not recall Haley offering any opinion about the petitioner's credibility, or on what kind of sentence the defendant should receive. Tr. 12/30/2002 at 44-45. Dr. Bernard Murphy's testimony was to the same effect: that Haley did not offer an opinion as to the petitioner's credibility. Tr. 12/30/2002 at 51. Dr. Murphy came away with a favorable impression of his jury service, saying that he "remember[ed] going home and telling [his] wife and [his] sister-in-law, who is an attorney, how impressed [he] was with the jury and the process, and [he] thought the people were very thoughtful and took their time in questioning, figuring out what was going on." Tr. 12/30/2002 at 52. Dr. Murphy did not

recall that Haley offered any opinion as to the petitioner's credibility. Tr. 12/30/2002 at 54, 56. Finally, juror Clifford Sturdivant testified that Haley did not inject any outside comments into the deliberations. Tr. 12/30/2002 at 58. He recalled that Haley "was one of the more reticent jurors" who "didn't offer a lot." Tr. 12/30/2002 at 59. Sturdivant said that Haley "listened more than he talked." Tr. 12/30/2002 at 59. Studivant also formed a favorable impression of this jury's conscientious discharge of its duty. Tr. 12/30/2002 at 61. The key piece of evidence for the jury, Sturdivant recalled, was the description of the state of the victim by the front desk clerk when the victim reported the rape. Tr. 12/30/2002 at 61-62.

Hunter testified that he talked with Haley outside of the courtroom not realizing that Haley was one of the jurors in the trial of Hunter's nephew. Hunter told Haley that he was there to be supportive of the petitioner's aunt, who was Hunter's girlfriend. Hunter said that young people were always getting into trouble and that the petitioner had been in trouble before involving women, alcohol and drugs. Hunter testified that he told Haley that the petitioner would not be able to beat the charge and that he would receive a sentence of twenty or thirty years. When Haley asked who his nephew was, Hunter said it was Roland Evans. When Hunter later realized that Haley was on the jury, he reported this discussion to Evans' attorney. Pet. App. 45a, 68a.

The investigator from the Public Defender's Office, Clarence Nelson also testified. According to

Nelson, Haley told him that a man had approached him outside the courtroom and said that the petitioner was always in trouble and had been in this kind of trouble before. Pet. App. 46a.

After hearing this evidence, and admitting affidavits into evidence, the trial court resolved the credibility issues with the various witnesses and concluded that the only information Hunter had imparted to Haley was that the petitioner was slick, and that Hunter hoped he got a long sentence. The court rejected the testimony that Hunter had told Haley that the petitioner had been in trouble before. The court concluded that Haley did not relay these statements to any of the other jurors and that the statements did not prejudice Haley as a juror. Therefore, no new trial was required. Pet. App. 46a.

**5.** Evans appealed again to the Court of Appeals of Virginia. Pet. App. 40a-47a. One judge of that court reviewed his petition for appeal and, by unpublished order, denied it. Pet. App. 47a. The court concluded that "[c]onsidering all the facts and circumstances, the trial judge did not abuse his discretion in denying appellant's motion for a new trial based upon juror misconduct." Pet. App. 47a. Evans sought review of that decision by a three-judge panel of the court. The three-judge panel denied the appeal by summary order. Pet. App. 12a.

**6.** On July 8, 2004, the Supreme Court of Virginia refused his petition for appeal. Pet. App. 12a.

**7.** Evans next filed a petition for a writ of habeas corpus in the Circuit Court for the City of Alexandria, raising a number of claims. The court concluded that his claims were either procedurally defaulted or had no merit. Pet. App. 13a-14a.

**8.** Evans appealed that petition to the Supreme Court of Virginia. That court refused his habeas appeal on December 11, 2006. Pet. App. 14a-16a.

**9.** After exhausting claims in state court, Evans filed a habeas corpus petition in the United States District Court for the Eastern District of Virginia, Norfolk division. A magistrate judge issued a detailed report, recommending dismissal of the petition. Pet. App. 7a-38a. With respect to the claim of juror misconduct, the report recommended dismissal of the claim as procedurally defaulted. Pet. App. 28a. The report found no reason to excuse the default. Pet. App. 30a-38a. The district court adopted the report and recommendation of the magistrate judge and dismissed the habeas corpus petition. Pet. App. 4a-6a. The district court declined to issue a certificate of appealability. Pet. App. 6a.

**10.** Evans appealed to the United States Court of Appeals for the Fourth Circuit. That Court concluded that the petitioner was not entitled to a certificate of appealability and dismissed the appeal by unpublished per curiam opinion. Pet. App. 2a. The Court observed that "Evans properly raised his allegations of juror misconduct on direct appeal" and, therefore, "the district court's ruling that the claim

was procedurally defaulted is debatable or wrong." Pet. App. 2a. In spite of this error, the Fourth Circuit stated that it would "[n]evertheless . . . decline to issue a certificate of appealability as to this issue because our review of the record leaves no uncertainty that the state court denial of this claim did not result in a decision contrary to, or an unreasonable application of, clearly established federal law." Pet. App. 2a. Finally, the Fourth Circuit declined to grant a rehearing or a rehearing *en banc*. Pet. App. 62a.

## REASONS FOR DENYING THE PETITION

Certiorari should be denied for three reasons. First, the petitioner identifies no conflict between the decision below and the law of any other state or federal circuit. The purported "conflict" is nothing more than the petitioner's disagreement with the way Virginia courts applied settled principles to his particular facts. In fact, this case is nothing more than a plea for error correction—and no error occurred.

Second, even if this Court were inclined to revisit settled law regarding how trial courts should handle *ex parte* communication between third parties and jurors, this case would present a poor vehicle to develop the law. The case comes to this Court not as a direct appeal but as a habeas corpus petition. Therefore, the state court's legal conclusions are not

reviewed under a *de novo* standard. Instead, this Court's role would be limited to a review of the state court's actions under the highly deferential standard of AEDPA.

Finally, no error occurred. Although the trial court initially erred in failing to grant the petitioner an evidentiary hearing on the allegations of *ex parte* communications with a juror, that decision was corrected in the state appellate process. On remand, the trial court conducted the required hearing, made credibility determinations based on the live testimony of witnesses, and concluded that the petitioner was not prejudiced. That conclusion is supported by the record and it was properly affirmed both on direct appeal in state court and later in the federal habeas corpus proceedings.

## I. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND OTHER FEDERAL CIRCUITS OR STATES.

Although Evans claims the existence of a conflict between the decision in his case and other decisions, he does not employ the term "conflict" in its ordinary sense. Ordinarily, when a litigant comes to this Court claiming the existence of a conflict, the conflict refers to a specific point of law on which courts have diverged. In other words, on the same facts, two courts would reach a different result. The petitioner refers to a "conflict" in the sense that the court reached an incorrect conclusion in his particular case,

and that this resolution in his case "conflicts" with settled precedent. *See* Pet. at 16-22. Nowhere does he identify where Virginia's jurisprudence is in any way different from that of any other federal court or other state court. To the contrary, the decisions he cites show that Virginia law is consistent with this Court's jurisprudence, the Fourth Circuit and other courts. For example, in his petition, Evans cites *Scott v. Virginia*, 399 S.E.2d 648, 650 (Va. Ct. App. 1990) (*en banc*) and *Wright v. Angelone*, 151 F.3d 151, 160 n.6 (4th Cir. 1998). Both of those cases address *ex parte* communications with a juror in entirely consistent terms. Both decisions rely on the same passage from this Court's decision in *Remmer v. United States*, 347 U.S. 227, 229 (1954).[3]

Therefore, although Evans claims a "conflict" between the decision in his case and other decisions, it is obvious from his petition that his argument sounds entirely in error correction. His complaint is that the state trial court, on remand from the Court of Appeals of Virginia, "recited the same flawed opinions as it has previously and" ignored the opinion of the appellate court. Pet. at 22. When Evans appealed from the *second* trial court decision, the Court of Appeals of Virginia supposedly, "capitulated

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[3] *See also Scott*, 399 S.E.2d at 650 (quoting *Remmer*); *Wright*, 151 F.3d at 160 n.6 (quoting the same passage from *Remmer*). *See also United States v. Cheek*, 94 F.3d 136, 141 (4th Cir. 1996); *Virginia v. Juares*, 651 S.E.2d 646, 647-48 (Va. 2007) (relying on *Remmer*).

to the circuit court's decision instead of examining the evidence on the merits." Pet. at 22. The fact that the petitioner relies heavily on Virginia decisions supports this conclusion. Of course, even if one assumes that Virginia courts committed an error in assessing a claim under settled Virginia precedent, that does not establish a "conflict" that calls for this Court's review.

Although there is no error, even if one occurred, this Court generally does not take routine cases for the purpose of error-correction. A writ of certiorari will be granted only for "compelling reasons." SUP. CT. R. 10. At most, the petitioner's claim is nothing more than "the misapplication of a properly stated rule of law." *Id.* Such petitions are "rarely granted," *id.*, because this Court simply cannot devote itself to case-specific error correction.[4] Nothing in this case calls for the Court to depart from this general practice.

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[4] *See Tory v. Cochran*, 544 U.S. 734, 739 (2005) (Thomas, J., joined by Scalia, J., dissenting) (noting that the Court does not grant review for "case-specific error correction"); *Overton v. Ohio*, 534 U.S. 982, 985 (2001) (Breyer, J.) (statement respecting denial of certiorari) (noting that the Court "cannot act as a court of simple error correction"); *Calderon v. Thompson*, 523 U.S. 538, 569 (1998) (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting) ("it is . . . axiomatic that this Court cannot devote itself to error correction.").

## II. THIS HABEAS CORPUS CASE PRESENTS A POOR VEHICLE TO DEVELOP SUBSTANTIVE PRINCIPLES OF CRIMINAL LAW.

Even if a conflict can be found—and Evans does not identify what aspect of the decision below or Virginia's jurisprudence is in conflict with the jurisprudence of any other court—this case would constitute a poor vehicle to resolve such a conflict. The case at bar is a federal habeas corpus case. Should the Court announce a "new rule" relating to *ex parte* communications between jurors and third parties, the application of this new rule to the petitioner's case would be barred by *Teague v. Lane*, 489 U.S. 288 (1989). *Teague* reflects the principle that habeas corpus is "a *collateral* remedy . . . not designed as a substitute for direct review." *Teague*, 489 U.S. at 306 (plurality decision) (emphasis original).[5] In other words, the Court would be limited to declaring what rule it has already "clearly established." However, the petitioner does not show or even contend that lower courts have struggled with respect to what is "clearly established" in this area. Therefore, there is no reason to grant certiorari.

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[5] *See also Mackey v. United States*, 401 U.S. 667, 682-83 (1971) (Harlan, J., concurring in judgments in part and dissenting in part).

## III. VIRGINIA COURTS CORRECTLY CONCLUDED THAT THE PETITIONER HAD SUFFERED NO PREJUDICE FROM THE *EX PARTE* COMMUNICATION BETWEEN THE JUROR AND A THIRD PARTY.

The final reason for declining to grant certiorari in this case is that no error occurred. Following a remand from the Court of Appeals of Virginia, the trial court conducted an evidentiary hearing to sort out the conflicting evidence. Following this hearing, the court reasonably concluded that the petitioner had suffered no prejudice. In reviewing these factual findings, the state trial courts and, eventually the Fourth Circuit in its review of the federal habeas corpus petition, properly deferred to these factual findings. Indeed, this Court's jurisprudence properly mandates such deference.

To prevail in this case, the petitioner must show that the decision of the state court on this point was "contrary to" or an "unreasonable application of" clearly established precedent from *this Court.* 28 U.S.C. § 2254(d).[6] The petitioner cites extensively to decisions from the Supreme Court of Virginia, the Court of Appeals of Virginia, the Fourth Circuit and United States district courts. Those decisions are not controlling because they do not set the standard to

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[6] *See also Williams v. Taylor*, 529 U.S. 362, 374-90 (2000).

determine whether a federal habeas petitioner will be afforded relief. 28 U.S.C. § 2254(d)(1).

Therefore, the departure point for the analysis is to determine what principles this Court has "clearly established." The Constitution protects a defendant's right to an impartial jury. U.S. CONST. amend. VI. That protection is applicable to the States through the Due Process Clause of the Fourteenth Amendment. U.S. CONST. amend. XIV. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). This Court has detailed in a series of cases what protections the Constitution affords to a defendant when an outside party communicates with a juror.

First, "[p]rivate communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." *Mattox v. United States*, 146 U.S. 140, 150 (1892). In *Remmer*, this Court noted that

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. That presumption is not conclusive, but the burden rests heavily upon

> the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

*Remmer*, 347 U.S. at 229.

However, for obvious reasons, the Constitution "does not require a new trial every time a juror has been placed in a potentially compromising situation . . . [because] it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). Jurors may have information about a particular defendant from the news media, or based upon their experience in a particular community, or from other sources. The fact that a juror is privy to information about a defendant, however, does not preclude jury service. What matters is whether "the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 723 (1961).

In determining prejudice, one factor to consider is whether the contact came from a government official or some private party. For example, this Court concluded that certain remarks by the bailiff, who was assigned to a sequestered jury, were prejudicial. *Parker v. Gladden*, 385 U.S. 363, 365-66 (1966) (*per curiam*). The bailiff had commented that the defendant was a "wicked fellow" who was "guilty." *Id.* at 363. The bailiff further told the jurors that the

Supreme Court would correct anything wrong in finding the defendant guilty. *Id.* at 364. Although ten jurors had stated that they had not heard the bailiff's statements, this Court noted that one of the jurors did state that she was prejudiced by the comments. *Id.* at 365. In finding prejudice, the Court stressed "the official character of the bailiff—as an officer of the court as well as the State" which status would "beyond question carr[y] great weight with a jury which he had been shepherding for eight days and nights." *Id.*

Perhaps most important for the resolution of this case, this Court has repeatedly held that federal courts would defer to a state court's resolution of the *factual issue* of a juror's partiality and what impact *ex parte* communications may have had on a particular juror. The Court has held that a state court's

> factual findings arising out of the state court's post-trial hearings are entitled to a presumption of correctness. The substance of the *ex parte* communications and their effect on juror impartiality are questions of historical fact entitled to this presumption. Thus, they must be determined, in the first instance, by state courts and deferred to, in the absence of "convincing evidence" to the contrary, by the federal courts.

*Rushen v. Spain*, 464 U.S. 114, 120 (1983) (per curiam) (citations omitted). Thus, when a state court finds that a jury's deliberations were not biased, "[t]his finding of 'fact'—on a question the state courts

were in a far better position than the federal courts to answer—deserves a 'high measure of deference,' and may be set aside only if it 'lack[s] even 'fair support' in the record.'" *Id.* (citations omitted).[7]

Applying these principles to the case at bar shows that the state court committed no error. First, the state court conducted the required hearing to inquire into the issue. Second, the evidence was uncontested that only one juror heard the comments at issue and that he did not impart those comments to the other jurors. Haley so testified, as did jurors Kay, Murphy and Sturdivant. Therefore, the present case is not one where the *entire* jury heard prejudicial comments. Third, the trial court properly sorted the applicable credibility issues. The one juror who heard the comment specifically testified in unequivocal terms that it did not affect his opinion of the defendant or his decision as a juror. Pet. App. 44a. The trial court credited this testimony. Second-guessing this factual finding, based on the live testimony of the juror, would be contrary to *Rushen*, *Patton* and *Miller* as well as 28 U.S.C. § 2254(d)(1). Moreover, the *ex parte* statements did not come from a court officer, such as a bailiff, to whom a juror might pay special deference. If anything, the hearing showed that the jury was very methodical and conscientious in its deliberations.

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[7] *Cf. Patton v. Yount*, 467 U.S. 1025, 1036 (1984) (issue of juror bias is a question of fact and its resolution by the state court is entitled to deference under 28 U.S.C. § 2254(d)); *Miller v. Fenton*, 474 U.S. 104, 114-15 (1985) (same).

In light of these facts, the Fourth Circuit properly concluded that the decision of the state court was neither contrary to, nor an unreasonable application of, clearly established principles of federal law. 28 U.S.C. § 2254(d). Equally important, the petitioner has failed to rebut the "presumptively correct" *factual findings* of the state court "by clear and convincing evidence." 28 U.S.C. § 2254(e). This Court has long recognized that the factual determinations inherent in assessing the impact upon a particular juror of an *ex parte* statement are quintessentially factual questions for trial courts to make. There is no reason to depart from these settled principles.

This Court should refuse to grant a certificate of appealabilty—which the petitioner does not even ask for—and deny the petition for a writ of certiorari.

## CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be **DENIED**.

Respectfully submitted,

ROBERT F. MCDONNELL
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
*Counsel of Record*
wthro@oag.state.va.us

STEPHEN R. MCCULLOUGH
Deputy State Solicitor General
smccullough@oag.state.va.us

OFFICE OF THE
ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219

Telephone: (804) 786-2436
Facsimile: (804) 786-1991

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*Counsel for Respondent*